DOCKET NO. UWY-CV14-6025333-S	**:**	**SUPERIOR COURT/CLD**
ROBIN SHERWOOD, ET AL	**:**	**J.D. OF WATERBURY**
V.	**:**	**AT WATERBURY**
STAMFORD HOSPITAL	**:**	**NOVEMBER 25, 2014**

OBJECTION TO MOTION TO STRIKE

The Plaintiff hereby objects to Defendant's Motion to Strike of September 19, 2014.

I. LAW PERTAINING TO A MOTION TO STRIKE:

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498, 815 A.2d 1188, 1200 (2003). "[I]t is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. Coe v. Bd. of Educ. of Town of Watertown, 301 Conn. 112, 116-17 (2011). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied.... Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell, 295 Conn. 240, 252 (2010). "Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." Id. at 253.

ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED

"Where the legal grounds for such a motion are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied." Comm'r of Labor v. C.J.M. Servs., Inc., 268 Conn. 283, 293 (2004).

"A motion to strike which is directed at the entire complaint must fail if any of the plaintiff's claims are legally sufficient. *Doyle v. A & P Realty Corporation*, 36 Conn.Sup. 126, 127, 414 A.2d 204 (1980), citing *Water Commissioners v. Robbins*, 82 Conn. 623, 633; 1 Stephenson, Conn.Civ.Proc. (2d Ed.1970) § 116(e)." Rossi v. Young, No. CV 29 47 36, 1993 WL 316789, at *2 (Conn. Super. Ct. Aug. 12, 1993).

II. ARGUMENT:

The Defendant's main argument seems to be that a hospital cannot be held as a product seller under Connecticut law. The defendant cites numerous Superior Court cases that support its Motion, but the Defendant omits the most recent case, Farrell v. Johnson & Johnson, et al, to which the Defendant is a party and which contradicts Defendant's arguments in its Motion. The Defendant is well-aware that a hospital can be held as a product seller in Connecticut.

A. **The Hospital is validly liable as a product seller.**

There are multiple Connecticut Superior Court decisions allowing a products liability claim to be asserted against a hospital. While there are some holding otherwise in various factual scenarios, "A close examination of these cases, however, reveals that the hospital has not cited any authority that establishes that a hospital cannot be a product

seller per se." Basso v. Boston Scientific Corp., 2008 WL 5252198, Conn. L. Rptr. 642 (Hiller, J., Nov. 21, 2008).

> On the other hand, at least three Superior Court judges have allowed a plaintiff to survive a motion to strike in a lawsuit against a hospital so long as the plaintiff has properly pleaded the elements of a product liability claim. See *Skerritt v. Sandoz Nutrition Corp.*, Superior Court, judicial district of New Haven, Docket No. 305253 (June 28, 1991, Schimelman, J.). (4 Conn. L. Rptr. 691); *Miller v. Pharmacia Labs*, Superior Court, judicial district of Fairfield, Docket No. 238538 (August 24, 1988, Jacobson, J.) (3 C.S.C.R. 733); *Taylor v. Staub*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV 83 0014120 (September 2, 1986, Kulawiz, J.) (1 C.S.C.R. 727).

Basso, supra; see also Charette v. McGhan Med. Corp., 1999 WL 185160 (Vertefeuille, J., March 23, 1999) ("Mercy Hospital's motion for summary judgment in this file is denied due to the existence of a genuine issue of material fact, i.e., whether the hospital, or Dr. Stone provided the plaintiff's breast implants.")

> "Product seller" and is defined in Connecticut General Statutes §52-572m(a):
> (a) "Product seller" means any person or entity, including a manufacturer, wholesale, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption.

Cases in other jurisdiction that have defined the term "seller" broadly in the context of strict products liability, extending a duty to warn to a party that has any "participatory connection, for personal profit or other benefit, with the injury-causing product and with the enterprise that created consumer demand for and reliance upon the product. "Kasel v. Remington Arms, Inc., 24 Cal.App.3d 711 725 (Cal.Ct.App.1972).

There is specific federal authority that classifies the Defendant as a manufacturer. The FDA has issued regulations specifically dealing with medical devices such as the one at issue pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 321 *et seq.,*. Under those

regulations a "manufacturer" of a medical device such as the ones at issue here is a defined term pursuant to 21 CFR 803.3

Manufacturer means any person who manufactures, prepares, propagates, compounds, assembles, or processes a device by chemical, physical, biological, or other procedure. The term includes any person who either:

(1) Repackages or otherwise changes the container, wrapper, or labeling of a device in furtherance of the distribution of the device from the original place of manufacture;

21 CFR 803.3. Although the Hospital seems to plainly qualify as a manufacturer of the devices in question pursuant to directly applicable federal law, if as a matter of fact they are seen as not a manufacturer then the Hospital is inarguably a distributor –

21 CFR 803.3 - *Distributor* means any person (other than the manufacturer or importer) who furthers the marketing of a device from the original place of manufacture to the person who makes final delivery or sale to the ultimate user, but who does not repackage or otherwise change the container, wrapper, or labeling of the device or device package. If you repackage or otherwise change the container, wrapper, or labeling, you are considered a manufacturer as defined in this section.

Under Connecticut's product liability act a "distributor" is a specifically enumerated term qualifying one as a product seller. General Statutes § 52–572m(a) ("'Product seller' means any person or entity, including a manufacturer, wholesaler, ***distributor*** or retailer . . .") (emphasis added)

Likewise, well reasoned decisions from other states have allowed product liability claims to be asserted against hospitals who sell defective medical devices. Skelton v. Druid City Hospital Board, 459 So.2d 818 (Ala. 1984); Saylor v. Providence Hospital, 680 N.E.2d 193, 196 (Ohio App. 1996) ("The consumer, in this case the patient, is at the least culpable end of the chain.").

Zichichi v. Middlesex Memorial Hosp., 204 Conn. 399, 409-10, 528 A.2d 805, (1987), relied on by the hospital, actually strongly supports the Plaintiff's position. In that case, the Court held that the blood shield statute Connecticut General Statutes §19a-280, which expressly provided that the provision of blood and blood products was the provision of services, not commodities for sale. The court held that this statute evidenced "that the legislature intended to treat blood and blood derivatives differently from other `products.'" Id

If, as claimed by the hospital, they are never properly deemed to be selling a medical product under any circumstances, than the blood shield statute was completely meaningless as the same rule already applied across all medical products. "It is a basic tenet of statutory construction, however, that the legislature does not intend to enact meaningless provisions." Sylvan R. Shemitz Designs, Inc. v. Newark Corp., 291 Conn. 224, 235, 967 A.2d 1188 (2009).

> Rather, "the legislature is always presumed to have created a harmonious and consistent body of law.... [T]his tenet of statutory construction ... requires [this court] to read statutes together when they relate to the same subject matter.... Accordingly, [i]n determining the meaning of a statute ... we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction.... [T]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have [on] any one of them." (Citations omitted; internal quotation marks omitted.) *Hatt v. Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003). We doubt that the legislature intended for the term "commercial loss" in § 52–572m(d) to encompass costs incurred by a commercial party in remedying property damage caused by a defective product because such an interpretation of the act contravenes these fundamental precepts of statutory construction.

Sylvan R. Shemitz Designs, Inc. v. Newark Corp., 291 Conn. 224, 235, 967 A.2d 1188 (2009).

This exact analysis caused the Texas Appellate Court to hold that its blood shield statute showed that hospitals were otherwise liable as a product seller for medical products not singled out for exclusion by the legislature.

> "(e) The implied warranties of merchantability and fitness shall not be applicable to the furnishing of human blood, blood plasma, or other human tissue or organs from a blood bank or reservoir of such other tissue or organs. Such blood, blood plasma or tissue or organs shall not for the purpose of this Title (Title 1. Uniform Commercial Code) be considered commodities subject to sale or barter but shall be considered as medical services." (Emphasis supplied).
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> It is a familiar rule of statutory construction in Texas that a specific exception stated by the Legislature "makes plain the intent that the statute should apply in all cases not excepted." *State v. Richards,* 157 Tex. 166, **301 S.W.2d 597**, 600 (1957). Any attempt by us to add the additional exclusion to § 2.315 now sought by appellant "would be repugnant to the statute." *Unigard Sec. Ins. Co. v. Schaefer (Tex.*1978) **572 S.W.2d 303**, 307. Appellant's proposition is also untenable under another familiar rule of statutory construction which calls upon the courts to give effect to legislative change in a statute. When the Uniform Commercial Code was first adopted by our Legislature, § 2.316 did not include the limited "medical services" exclusion now included therein. Acts 1965, 59th Leg., Vol. 2, ch. 721, p. 25, § 2-316. If we should assume in support of appellant's argument that the Uniform Commercial Code as initially enacted was not intended to impose the warranty in § 2.315 against "health-care providers of medical services" generally, then the later action by our Legislature amending § 2.316 to include the single exception for "medical services" would evince the intent to change the prior law, and it is the duty of the courts to give effect to the change. *American Surety Co. of New York v. Axtell Co.,* 120 Tex. 166, **36 S.W.2d 715**, 719 (1931); *Texas Bank & Trust Co. v. Austin,* 115 Tex. 201, **280 S.W. 161**, 162 (1926).

Providence Hospital v. Truly, 611 S.W.2d 127, 133 (Tex.Civ.App. —Waco 1980)(Truly also found upheld a violation of Texas's Deceptive Trade Practices Act)

As between the hospital, which can easily insist on an indemnification agreement for products from the manufacturer (see sample attached) and the wholly innocent victim of the defective product, there is simply no reason to read into the plain language of the product liability act and exemption for hospitals that is not contained therein. The hospital's claim that it is unfair for it to shoulder such a burden is misguided as it could have required an indemnification clause as part of its purchase order and can still seek a common law indemnification claim. Bakker v. Brave Industries, Inc. 829 A.2d 928, 48 Conn.Supp. 70(2002); Malerba v. Cessna Aircraft Co. 554 A.2d 287, 210 Conn. 189, 198(1989)

Particularly for an implanted medical device such as the present one, the hospital is a key player in the regulatory scheme. They are deemed mandatory reporters of adverse events by the FDA whose feedback is critical in evaluating the safety and efficacy of devices such as the very one at issue. This is not simply some hypothetical academic theory but provably the case as to the very product at issue in this case. The Hospital's willful and egregious failure to report adverse events, including Ms. Sherwood's which they inarguably have direct knowledge of, likely contributed to the delay in FDA action leading to serious complications for thousands of women around the country. While the hospital's misguided belief that it is immune for any harm that may come to its patients from defective products it propagates may well explain the hospital's failure to comply with its reporting obligations, that hardly means this Court should reward such behavior.

The hospital seems to be under the belief that it is not subject to liability in this case because it did not design the subject product or any warnings regarding the same. This is

clearly incorrect as it is strictly liable as a product seller for the defective products and failure to warn which caused the Plaintiff's injury. "It is, on the contrary, well established in Connecticut that the doctrine of strict tort liability applies equally to manufacturers and sellers alike." Stanton v. Carlson Sales, Inc., 45 Conn.Supp. 531, 539, 728 A.2d 534 (Blue, J., 1998). Under General Statutes § 52-572m (a), " '[p]roduct seller' means any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use or consumption. The term 'product seller' also includes lessors or bailors of products who are engaged in the business of leasing or bailment of products."

> It is true that manufacturers, wholesalers, and retailers who sell a defectively manufactured product are ordinarily jointly and severally liable to a consumer or user injured as a result of the defect. Liability is imposed on the successive sellers, not because they caused the defect, but merely because they sold the defective product.

Marko v. Stop & Shop, Inc., 169 Conn. 550, 556, 364 A.2d 217 (1975). "[T]he products liability act expressly contemplates and provides for the allocation of liability along a product's chain of distribution." Sylvan R. Shemitz Designs, Inc. v. Newark Corp., 291 Conn. 224, 233–34, 967 A.2d 1188 (2009).

> We cannot ignore the fact that hospitals, whether profitable or not, are businesses. They are not merely buildings which provide housing for the seriously-ill patients or independent physicians.
>
> In the course of their competition, hospitals certainly hold themselves out to the public as having special knowledge regarding the provision of medical services to patients. Inherent in this presentment is a warranty that the hospital will sell, furnish, or supply patients with goods for use in the provision of medical services which are fit for their intended purpose.

Skelton v. Druid City Hospital, 459 So.2d 818, 822-23 (Ala. 1984)

> The gist of an action under this section is reliance. Patients are rarely in a position to judge the quality of the medical supplies and other goods sold to them and used in their care; often, those supplies are of an inherently dangerous nature. The complete dependence of patients on the staff of a hospital to choose fit products for their care justifies the imposition of an implied warranty under § 7-2-315, whether the hospital is a "merchant" or not.

Skelton v. Druid City Hospital, 459 So.2d 818, 823 (Ala. 1984); Perfetti v. McGhan Medical, **662 P.2d 646**, 654 (NM App. 1983)(hospital liable for strict liability for defective product).

Therefore, the Defendant's Motion should be denied.

THE PLAINTIFFS,

BY /s/ *Jacqueline E. Fusco*

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CERTIFICATION

This is to certify that a copy of the foregoing was Emailed this date, to all counsel of record.

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